(1) Supreme Court
FILED

NO. 95-185 JUL 13 1995

OFFICE OF THE CLERK

Supreme Court of the United States

JULY TERM, 1995

CHRISTOPHER FLORIO, et al.

Petitioners

VS.

GARY SKOREPA, et al.

Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Robert J. Sindyla (0024344)
Attorney for Petitioners
7530 Lucerne Drive, Suite 200
Middleburg Heights, OH 44130
(216) 243-2800

42pp

NO. _____

Supreme Court of the United States

JULY TERM, 1995

CHRISTOPHER FLORIO, et al.

Petitioners

VS.

GARY SKOREPA, et al.

Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Robert J. Sindyla (0024344)
Attorney for Petitioners
7530 Lucerne Drive, Suite 200
Middleburg Heights, OH 44130
(216) 243-2800

WHETHER THE SIXTH CIRCUIT COURT OF APPEALS COMMITTED REVERSIBLE ERROR WHEN IT HELD THAT A CITY EMPLOYEE'S REVELATIONS OF MUNICIPAL WASTE AND MISMANAGEMENT AT AN OPEN-FORUM CITY COUNCIL MEETING WERE NOT MATTERS OF PUBLIC CONCERN AND THUS NOT PROTECTED UNDER THE FIRST AMENDMENT'S GUARANTEE OF FREEDOM OF SPEECH.

WHETHER THE SIXTH CIRCUIT'S REQUIREMENT THAT SPEECH MUST INVOLVE PUBLIC CORRUPTION IN ORDER TO BE A MATTER OF PUBLIC CONCERN IS AN UNDUE RESTRICTION UPON THE FIRST AMENDMENT RIGHTS OF GOVERNMENT EMPLOYEES THAT REMAINS UNSUPPORTED AND IN CONFLICT WITH THE RULES RENDERED BY OTHER FEDERAL JURISDICTIONS.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 2

ARGUMENT 4

I. THE SIXTH CIRCUIT COURT OF APPEALS COMMITTED REVERSIBLE ERROR WHEN IT HELD THAT A GOVERNMENT EMPLOYEE'S REVELATIONS OF MUNICIPAL WASTE AND MISMANAGEMENT AT AN OPEN-FORUM CITY COUNCIL MEETING WERE NOT MATTERS OF PUBLIC CONCERN AND THUS NOT PROTECTED UNDER THE FIRST AMENDMENT'S GUARANTEE OF FREEDOM OF SPEECH 4

A. This Court Has Established That Statements Like Those Made By Petitioner Regarding the Operations of Government Are Matters of Public Concern 5

B. The Sixth Circuit's Decision in This Matter Has Instituted Two Unreasonable Prerequisites to Meeting the Public Concern Test 6

C. Allowing the Sixth Circuit's Decision to Stand Will Allow Courts to Put Arbitrary Restrictions Upon Fundamental Rights Without the Accountability other Branches of Government Must Suffer When Doing the Same 7

II. THE SIXTH CIRCUIT'S REQUIREMENT THAT SPEECH MUST INVOLVE PUBLIC CORRUPTION IN ORDER TO BE A MATTER OF PUBLIC CONCERN IS AN UNDUE RESTRICTION UPON THE FIRST AMENDMENT RIGHTS OF GOVERNMENT EMPLOYEES THAT REMAINS UNSUPPORTED AND IN CONFLICT WITH THE RULES RENDERED BY OTHER FEDERAL JURISDICTIONS 9

A. Scrutiny of the Rulings of Other Federal Jurisdictions Reveals an Alarming Discrepancy Between the Circuits Regarding What Constitutes a Matter of Public Concern 10

B. This Court Should Clarify the Criterion for Determining Matters of Public Concern In Order To Prevent Further Sacrifice of the Constitutional Rights of Government Employees to the Chaos of Inconsistent Decisions That Have Arisen in This Area 11

CONCLUSION 13

CERTIFICATE OF SERVICE 14

APPENDICES A1

TABLE OF AUTHORITIES

Cases

Barnes v. Small,
840 F.2d 972 (D.C. Cir. 1988) 9

Berger v. Battaglia,
770 F.2d 992 (4th Cir. 1985), cert. denied, 476 U.S. 1159(1986). 9

Blum v. Schlegel,
18 F.3d 1005 (2nd Cir. 1994) 7,9

Casey V. City of Cabool,
12 F.3d 799 (Bth Cir. 1993), cert. denied, 115 S.Ct. 325 (1994) 4

Connick v. Myers,
461 U.S. 138 (1983) 4,7,10

Consolidated Edison Co. v. Public Service Common,
447 U.S. 530 (1980) 12

Czurlanis v. Albanese,
721 F.2d 98 (3rd Cir. 1983) 7,10,11

Edmondson v. Borough of Kennett Square,
881 F.Supp. 188 (E.D. Pa. 1995) 9

Ferrara v. Mills,
781 F.2d 1508 (llth Cir. 1986) 9

First Nat'l Bank v. Belotti,
435 U. S. 765 (1978) 5

Fiske v. Kansas,
274 U.S. 380 (1927) 8

Garrison v. Louisiana,
379 U.S. 64 (1964) 5

Glass v. Dachel,
2 F.3d 733 (7th Cir. 1993) 11

Gomez v. Texas Dept of Mental Health and Mental Retardation,
794 F.2d 1018 (5th Cir. 1986) 9

Grady v. El Paso Community College,
979 F.2d 1111 (5th Cir. 1992) 7,9

Henry v. Department of the Navy,
902 F.2d 949 (Fed. Cir. 1990). 9

Hoffman v. Mayor,
905 F.2d 229 (8th Cir. 1990) 11

Konigsberg v. State Bar of California,
366 U.S. 36 (1961) 8

Korematsu v. United States,
323 U.S. 214 (1944) 7

Marohnic v. Walker,
800 F.2d 613 (6th Cir. 1986) 11

Mc Kinley v. City of Eloy,
705 F.2d 1110 (9th Cir. 1983) 4,9

Monsanto v. Quinn,
674 F.2d 990 (3rd Cir. 1982) 9,12

Murray v. Gardner,
741 F.2d 434 (D.C. Cir. 1984) 9

New York Times Co. v. Sullivan,
376 U. S. 254 (1964) 5,6,12

North Carolina State Bd. of Education v. Swann,
402 U.S. 43 (1971) 7

Palko v. Connecticut,
302 U.S. 319 (1937) 12

Picketing v. Board of Education,
391 U.S. 563 (1968) 4,7,11

Rankin v. Mc Pherson,
483 U. S. 378 (1987) 4,5,7

Rookard v. Health and Hospitals Corp.,
710 F.2d 41 (2nd Cir. 1983) 11

Rutan v. Republican Party of Illinois,
497 U.S. 62 (1990) 8

United States v. National Treasury Employees Union,
115 S.Ct. 1003 (1995) 7

Whitney v. California,
274 U.S. 357 (1927) 12

Constitutional and Statutory Provisions

U. S. Cons t. Amend I 2,4,5,6,7,8,9,11,12

28 U.S.C. § 1257 (1988) 1

42 U.S.C. § 1983 (1988) 2,DI

Theses

Estlund, Cynthia L., Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category, 59 Geo. Wash. L. Rev. 1 (1990)..... 8

Greenberg, Stanford N., First Amendment: The Free Speech Rights of Public Employees, 57 Geo. Wash. L. Rev. 1281 (1989)..... 5

NO. _____

IN THE UNITED STATES SUPREME COURT
JULY TERM, 1995

CHRISTOPHER FLORIO, et al.

Petitioners,

VS.

GARY SKOREPA, et al.

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

All opinions rendered by the United States District Court for the Northern District of Ohio and the United States Court of Appeals for the Sixth Circuit are unreported. The District Court's opinion granting Respondents' Motion for Summary Judgment is attached hereto in its entirety as Appendix A. The opinions of the Sixth Circuit remanding in part the Motion to Dismiss and affirming the grant of summary judgment are additionally attached in their entirety as Appendices B and C, respectively.

JURISDICTIONAL STATEMENT

The judgment of the United States Circuit Court of Appeals for the Sixth Circuit granting Respondents' Motion for Summary Judgment was rendered on May 30, 1995. Petitioners submit their Petition for Writ of Certiorari on the jurisdictional basis enumerated in 28 U.S.C. § 1257 (1988), which provides in relevant part that "[c]ases in the courts of appeals may be reviewed by the Supreme Court by .... writ of certiorari granted upon the petition of any party to any civil or criminal case..."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This matter involves interpretation of the First Amendment of the United States Constitution which states that

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. I. This matter additionally involves a question of illegal abridgment of these enumerated rights under 42 U.S.C. § 1983 (1988), which is set forth in its entirety in Appendix D, hereto attached.

STATEMENT OF THE CASE

On February 14, 1991, Petitioners, Christopher and Sharon Florio ("Petitioners" or, singularly, "Florio"), instituted this action in the United States District Court for the Northern District of Ohio against Respondents, Mayor of the City of North Royalton, Gary Skorepa, and the City of North Royalton ("the City" or Respondents"), for retaliatory discharge in violation of 42 U.S.C. § 1983 (1988).

After several pleadings were filed, an initial appeal in this matter arose upon the District Court's denial of the City's Motion to Dismiss. The Sixth Circuit Court of Appeals upheld a portion of the denial and remanded the case for further determination of the issues.

On August 24, 1992, the City filed its Motion for Summary Judgment, in response to which Petitioners filed their Brief in Opposition as well as their own Motion for Summary Judgment. The District Court granted the City's Motion. Petitioners timely appealed this decision, but the Sixth Circuit upheld the summary judgment grant to the City. Petitioners now file their Petition for Writ of Certiorari to this honorable Court.

STATEMENT OF THE FACTS

On September 18, 1989, the North Royalton City Council and North Royalton Mayor Gary Skorepa convened in their routine manner for their bimonthly town meeting. First the members discussed their official business; they then prepared for the "free speech" period conducted by the North Royalton citizens. This "free speech" period permits city citizens to address any issue before the adjournment of council.

Typically, the town meeting is attended by many of North Royalton's 23,000 residents who are concerned about the way in which their taxpayer dollars are being spent by the city. One of these concerned residents was Petitioner, Christopher Florio, who also worked for the City of North Royalton Service Department as a garbage man.

When the "free speech" period began, Florio arose and introduced himself as a North Royalton resident who wanted to voice his concerns about the direction of the City. Florio questioned the council about waste and mismanagement within the City. Florio then revealed that at least one city employee was given special privileges which permitted him to accumulate excessive overtime hours costing the city thousands of dollars. This employee was also permitted to drive a City vehicle to and from work at City expense. These special privileges were not afforded to any other employees, Florio noted. Florio then revealed more governmental abuse when he asked the City Fathers why this employee was permitted to act also as a secretary to the Service Director with a salary in great excess of other city secretaries, again costing the City thousands of dollars. Florio suggested that perhaps the City would incur less expense by hiring regular clerical assistance for that position, since such clerical employees typically were paid less than the Class III laborer who was given this position. Florio concluded by voicing his concerns that the Service Director had been abusing his authority by threatening co-workers with serious bodily harm. With that, Florio sat down.

Three days later, on September 21, 1989, Florio lost his job. Mayor Skorepa supplied no explanation for the suspension.

In an attempt to regain his position with the City, Florio filed a grievance through his collective bargaining agent, AFSCME Council 8, AFL-CIO. The grievance proceeded to a hearing at which Mayor Skorepa was scheduled to preside. Mayor Skorepa did not do so however, in order to permit himself to testify regarding his unexplained decision to suspend Florio.

Mayor Skorepa instead appointed the City's labor attorney to preside over the hearing. Following the hearing, the City's labor attorney supported Mayor Skorepa and held that Florio's speech contravened a collective bargaining provision[1].

Consequently, on September 29, 1989, the attorney converted Florio's suspension into permanent discharge.

Immediately thereafter, AFSCME filed for arbitration of the dispute. On December 15, 1990, the arbitrator struck down the ruling of Mayor Skorepa's labor attorney on the ground that no just cause existed to terminate Florio. The arbitrator thus reinstated Florio to his former position, but did not award him his lost wages caused by Mayor Skorepa's retaliatory conduct.

As a result of Florio's speech exposing the waste and mismanagement being practiced by city officials[2], he lost $31,941.47 in wages, several seniority rights, and the opportunity for the promotion which arose during his year-long discharge. Meanwhile, Florio's courageous voice, which

---

[1] It is now undisputed that no provision exists within Ohio Revised Code Chapter 4117, Public Employee's Collective Bargaining Act, that prohibited Florio from speaking on matters concerning public employees.

[2] Each of Florio's revelations concerning waste and mismanagement was subsequently corrected by Mayor Skorepa.

spoke out against governmental waste and mismanagement during the "free speech" period at his town's meeting, has been effectively silenced.

ARGUMENT

I. THE SIXTH CIRCUIT COURT OF APPEALS COMMITTED REVERSIBLE ERROR WHEN IT HELD THAT A GOVERNMENT EMPLOYEE'S REVELATIONS OF MUNICIPAL WASTE AND MISMANAGEMENT AT AN OPEN-FORUM CITY COUNCIL MEETING WERE NOT MATTERS OF PUBLIC CONCERN AND THUS NOT PROTECTED UNDER THE FIRST AMENDMENT'S GUARANTEE OF FREEDOM OF SPEECH.

When public employees speak as citizens on matters of public concern regarding the government entity for which they work, the First Amendment shields them from retaliatory action by their employers for such speech. Pickering v. Board of Education, 391 U.S. 563 (1968). Upon seeking redress for discharges motivated by his speech, an aggrieved employee must first prove that his speech did in fact involve a matter of public concern. Connick v. Myers, 461 U.S. 138 (1983). A court determines this threshold question of law by looking into the "content, form, and context" of the employee's speech. Connick, 461 U.S. at 147-48; Rankin v. McPherson, 483 U.S. 378, 385. If the court decides in favor of the employee on this issue, the employee is then entitled to have his interests as a citizen speaking out on matters important to the public balanced against those interests of the state in regulating its operations. Connick, 461 U.S. at 142.

The "content, form, and context" of Petitioner's speech in the case at bar reveal that, contrary to the holdings of both the Sixth Circuit Court of Appeals and the District Court, Petitioner did in fact meet this Court's threshold requirement of engaging in speech on a matter of public concern, Petitioner spoke out against city policies that wasted taxpayer money and city officials who were abusing their power. "Few topics are of greater public concern." Casey v. City of Cabool, 12 F.3d 799,____, cert. denied, 115 S.Ct. 325 (1994). Petitioner additionally did so at an open-forum town meeting at which any citizen could voice his concerns, supposedly without fear of retaliation. See Mc Kinley v. City of Eloy, 705 F.2d 1110 (9th Cir. 1983) (finding fact that speech at city council meeting regarding competency of police force as pivotal factor). In its decision however, the Sixth Circuit ignored each of these vital components and instead established its own criteria for determining whether or not a public employee's speech involves a matter of public concern. Such criteria stand in direct conflict with the mandates handed down by this Court and at the same time place unreasonable limitations upon the fundamental rights of citizens employed by the government. Such action compels this Court to grant certiorari in this matter and review the erroneous Sixth Circuit decision.

A. This Court Has Established That Statements Like Those Made By Petitioner Regarding the Operations of Government Are Matters of Public Concern.

This Court first applied the "public concern" test in the public employment context to allow employees to exercise their First Amendment rights while at the same time preventing an overload of lawsuits against employers by employees fired for legitimate reasons. See Rankin, 483 U.S. at 395 (Scalia, J., dissenting). This Court however, has never rendered a precise definition of "matters of public concern". Greenberg, Sanford N., First Amendment: The Free Speech Rights of Public Employees, 57 Geo. Wash. L. Rev. 1281, 1291-93. Guidance has nonetheless been provided in several cases, suggesting that matters of public concern are political topics that touch "the heart of the First Amendment". First Nat'l Bank v. Bellotti, 435 U.S. 765, 776 (1978). This Court has also suggested that matters of public concern are often those that further "the essence of self-government" by informing the electorate. Garrison v. Louisiana, 379 U.S. 64, 74 (1964).

In its first confrontation on this issue, this Court categorized speech involving public figures or entities as speech of special public significance. New York Times Co. v. Sullivan, 376 U.S. 254 (1964). The petitioners in Sullivan had been sued for libel by a Montgomery city official as a result of an advertisement published in the New York Times. Id. at 260. The advertisement indirectly criticized the Sullivan respondent in his official capacity following a confrontation between Alabama law enforcement officials and civil rights demonstrators. Id. at 263. Contrary to the allegations of the advertisement, the respondent had not been involved in the events described in the article. Id.

The trial judge refused to charge the Sullivan jury that they needed to find actual malice prior to awarding punitive damages to the plaintiff. Id. The jury consequently awarded the plaintiff $500,000.00 in damages. Id. at 260. On appeal, the Alabama Supreme Court affirmed the judge's rulings and the verdict. Id. This Court granted certiorari, and reversed the judgment. Id. at 269.

Because the Sullivan plaintiff was a public official being criticized in his official capacity, the Court protected the speech under the First Amendment absent a showing of actual malice by the speaker. Id. Sullivan justified the heightened standard as one that furthered the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open..." Id. at 270. Any limitations on speech about such public figures, the Court reasoned, would "dampen[] the vigor and limit[] the variety of public debate[,]" and thus be "inconsistent with the First and Fourteenth Amendments." Id. As a result, the Court attributed speech about public officials greater protection from suit. Id.

Sullivan guides this Court in the case at bar by demonstrating that speech involving public officials or entities is in fact of great concern to

citizens at-large. Like the Sullivan petitioners, Petitioner in this matter spoke about wasteful city policies that were of interest to the public. Today, following recent scandals such as that in the House Bank, unneeded waste of taxpayer dollars is perhaps as important to the public as was abuse of civil rights demonstrators at the time Sullivan's advertisement was published. Likewise, Petitioner in the case at bar spoke at a traditional forum—a town meeting—where "uninhibited, robust, and wide-open" debate takes place, as it did in the Sullivan newspaper. Limitations placed on Petitioner's speech about City officials then, would also "dampen[] the vigor and limit[] the variety of public debate," as was the case in Sullivan. Accordingly, any such limitations in this matter are "inconsistent with the First and Fourteenth Amendments." The Sixth Circuit's decision thus defied this Court's mandate when it erroneously held otherwise.

Respondents may attempt to differentiate Sullivan on the ground that it involved a libel action rather than the retaliatory discharge at issue here. Such an assertion nonetheless misses the point, for the **nature of the speech** was pivotal in Sullivan, **not the cause of action.** In fact, closer inspection of Respondents' argument reveals that the libel nature of Sullivan's case actually works in Petitioners' favor. Sullivan provided heightened protection for speech against public officials **even though it was possibly defamatory.** The Court noted that "some of the statements contained in the [advertisement] were not accurate descriptions of events which occurred...." Id. at 263. Nevertheless, Sullivan deemed the speech important under the First Amendment despite its falsity because it commented upon the activities of public officials. Id. at 270. Only absurdity would render a rule that provides heightened protection for such inaccurate, defamatory statements but abandons truthful ones like Petitioner's. On the contrary, such speech should be of equal importance regardless of the context in which it is used. Respondents' argument thus proves that the Sixth Circuit indeed erred when it held that Petitioner's speech did not involve a matter of public concern. This Court should as a result grant certiorari in this matter in order to correct that erroneous decision.

B. The Sixth Circuit's Decision in This Matter Has Instituted Two Unreasonable Prerequisites to Meeting the Public Concern Test.

Not only did the Sixth Circuit fail to realize that the activities of political entities are matters of public concern, but it created two absurd standards for assessing the same as well. First, the Sixth Circuit quoted the District Court's statement in its opinion that "[a]lthough Plaintiff Florio may have been justified in believing that the City was misspending tax dollars .... **he did not intend to uncover any illegal activity or breach of the public trust"** (emphasis added). See Appendix C. In other words, the Sixth Circuit now requires a person to determine whether or not his information is important to the public prior to his speech. Such a standard makes little sense because it is too subjective and contradicts the idea of "public"

concern. "Virtually every citizen has a personal interest in matters of public concern; after all, each citizen is a member of the public...." Blum v. Schlegel, 18 F.3d 1005, 1012 (2nd Cir. 1993). Cf. Grady v. El Paso Community College, 979 F.2d 1111, 1114 (5th Cir. 1992) (remarking that public concern should be judged according to the thoughts of "a reasonable official"). Public concern should thus be determined on an objective plane **by assessing what the public believes** is important, **not the speaker.** Besides, Florio revealed the City's waste and mismanagement at an open-forum council meeting; he therefore must have had intended to reveal it to the public. Any other interpretation would require this Court to assume Florio acted in bad faith by attempting to subvert the system.

Secondly, the Sixth Circuit has now placed a higher burden upon its plaintiffs by requiring that allegations of waste and misspending "be linked to proof of corruption". See Appendix C. Such a requirement straps speakers with an additional duty to investigate their suspicions rather than disclose them to persons more able to do so themselves. Such is certainly not the purpose behind the First Amendment. See Czurlanis v. Albanese, 721 F.2d 98 (3rd Cir. 1983) (discussed below). As a result, this Court should not ignore the Sixth Circuit's decision. Petitioner's Petition for Writ of Certiorari should be granted and the merits of the matter heard.

C. Allowing the Sixth Circuit's Decision to Stand Will Allow Courts to Put Arbitrary Restrictions Upon Fundamental Rights Without the Accountability other Branches of Government Must Suffer When Doing the Same.

Insight into the Sixth Circuit's heightened standard for determining matters of public concern reveals a dangerous new precedent. The heightened definition of matters of public concern limits the fundamental First Amendment rights of public employees to speech about corruption for which they have corroborating evidence.[3] Suspicions and perhaps opinions are no longer sufficient bases for speaking out against public officials. For years however, this Court has faithfully held that no fundamental right can be abridged by a government body without such action undergoing the strictest of scrutinies. E.g., Korematsu v. United States, 323 U.S. 214 (1944) (subjecting law hindering right to travel freely to strict scrutiny); North Carolina State Board of Education v. Swann, 402 U.S. 43 (1971) (holding government policies that hinder guaranteed rights must fall). In fact, when Congress or a state enacts a law that limits speech rights, such laws are often struck down. See, e.g., United States v. National Treasury Employees Union, et al., 115 S.Ct. 1004 (1995) (striking down congressional ban on

[3] Petitioner recognizes that this Court has limited the First Amendment rights of public employees with its decisions in Pickering, Connick, and Rankin, supra. Petitioner contends nonetheless that the Sixth Circuit has gone beyond these acceptable limitations and imposed a greater burden upon the fundamental rights of public employees.

honoraria received by federal officers for making speeches); Fiske v. Kansas, 274 U.S. 380 (1927) (holding state criminal syndicalism statute unconstitutional as applied to defendant advocating organization of working class). Consequently, failure to review the Sixth Circuit's decision in this matter would allow courts to do exactly what other entities may not do without the strictest scrutiny. This Court should not allow the lower courts to go beyond the decisions it has rendered and devise unreasonable restrictions to fundamental rights without some accountability. "Such... venerable and accepted traditions [should] not ... be laid on the examining table and scrutinized for [their] conformity to some abstract principle of First Amendment adjudication devised by [a] Court"[4]. Rutan v. Republican Party of Illinois, 497 U.S. 62, 94 (1990) (Scalia, J., dissenting). Fundamental rights are fundamental rights regardless of whether a legislature or the courts are limiting them. Conversely, allowing the Sixth Circuit to unabatedly create different standards for assessment of public employee speech will bring to reality Justice Black's "fear that the creation of 'tests' by which speech is left unprotected under certain circumstances is a standing invitation to abridge [it]." Konigsberg v. State Bar of California, 366 U.S. 36 (1961) (Black, J., dissenting). Tests for matters of public concern like that of the Sixth Circuit

> will generate... a judicially approved catalogue of legitimate subjects of public discussion. That prospect alone should condemn the entire undertaking, for the Constitution empowers the people, not any branch of the government, to define the public agenda.

Estlund, Cynthia L., Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category, 59 Geo. Wash. L. Rev. 1, 37 (1990). This Court should not allow the Sixth Circuit's decision in this matter to stand without careful scrutiny. It should therefore grant Petitioner's request for Writ of Certiorari and review this matter on its merits.

---

4 Justice Scalia was speaking in reaction to the Court's decision to prohibit public employer decisions based on patronage. Justice Scalia believed that since such decisions are not prohibited by the Bill of Rights and were an established national tradition prior to their enactment, public employers should be permitted to make such decisions if they choose.

Petitioners use a similar rationale here in that the practice of speaking freely on political topics is entrenched both in our national traditions as well as activity that lies "at the heart of the first amendment." First National, 435 U.S. at 776. They should therefore not be sacrificed to the whim of a Court that has decided to place restrictions on free speech rights without any accountability.

II. THE SIXTH CIRCUIT'S REQUIREMENT THAT SPEECH MUST INVOLVE PUBLIC CORRUPTION IN ORDER TO BE A MATTER OF PUBLIC CONCERN IS AN UNDUE RESTRICTION UPON THE FIRST AMENDMENT RIGHTS OF GOVERNMENT EMPLOYEES THAT REMAINS UNSUPPORTED AND IN CONFLICT WITH THE RULES RENDERED BY OTHER FEDERAL JURISDICTIONS.

The several jurisdictions have also grappled with the meaning of the term "matter of public concern". Some jurisdictions focus their determination "upon whether or not the 'public' or the 'community' is likely to be truly concerned with or interested in the particular expression, or whether it is more properly viewed as essentially a 'private' matter between employer and employee." Berger v. Battacilia, 779 F.2d 992, 999 (4th Cir. 1985), cert. denied, 476 U.S. 1159 (1986). Accord Gomez v. Texas Dept of Mental Health and Mental Retardation, 794 F.2d 1018 (5th Cir. 1986) (holding that interest among employees of two government agencies did not rise to level of public concern because no interest existed in community at-large). Others consider an issue to be of public interest when the local news media has determined "that the communication is newsworthy...." Monsanto v. Quinn, 674 F.2d 990 (3rd Cir. 1982). Accord Ferrara v. Mills, 596 F. Supp. 1069, 1075 (S.D. F1. 1984), aff'd, 781 F.2d 1508 (11th Cir. 1986) (identifying matters of public concern as those involving "then-current public debate"). Such standards have led to holdings that speech on the Persian Gulf War, Grady, 979 F.2d 1111 (5th Cir. 1992), racism, Henry v. Department of the Navy, 902 F.2d 949 (Fed. Cir. 1990), and drug legalization, Blum v. Schlegel, 18 F.3d 1005 (2nd Cir. 1993), are matters of public concern.

Other districts have identified matters of public concern by stating what they are not. For example, one court has suggested that statements failing to "inject specific information into the market-place [sic] of ideas" or that act simply as "conclusory attack[s] that fail[] to touch upon ... a specific accusation of improper conduct" do not constitute matters of public concern. Edmondson v. Borough of Kennett Square, 881 F.Supp. 188,_____ (E.D. Pa. 1995). Similarly, the Ninth Circuit has stated that speech fails the public concern test when a matter is of "no relevance to the public's evaluation of the performance of governmental agencies." Mc Kinley, 705 F.2d 1110, 1114 (9th Cir. 1983). See also Murray v. Gardner, 741 F.2d 434 (D.C. Cir. 1984) (quoting same). Finally, allegations that touch upon employee misbehavior that is impertinent to the public interest are additionally not matters of public concern. Barnes v. Small, 840 F.2d 972, 982 (D.C. Cir. 1988).

Regardless of which of the above standards is applied in this case, Petitioner's speech would have been protected as a matter of public concern. The North Royalton "'public' or...'community' is likely to be concerned with" whether or not the Service Department is wasting their

taxpayer dollars by paying certain favored employees two salaries or excessive overtime. Similarly, one only look to daily local or national news reports to determine that government waste and mismanagement is a "newsworthy" topic. Moreover, Petitioner's charges of favoritism and power abuse were "specific allegations of improper conduct" that are of interest to the public. Even with such seemingly uniform results under these tests, the Sixth Circuit has nevertheless confused the area by establishing a stricter test that remains unsupported by the other circuits. When courts have held that racism and legalization of drugs are matters of inherent public concern, one ponders how another can render a decision that views allegations of government waste and mismanagement of taxpayer funds as insufficient to meet the standard. This Court should resolve the confusion by granting Petitioner's Petition for Writ of Certiorari in order to establish a clearer standard against which to judge matters of public concern.

A. Scrutiny of the Rulings of Other Federal Jurisdiction Reveals an Alarming Discrepancy Between the Circuits Regarding What Constitutes a Matter of Public Concern

To further illustrate the inconsistency of holdings among the several jurisdictions, this Court should view Petitioner's case in light of the Third Circuit's decision in Czurlanis, 721 F.2d 98 (3rd. Cir. 1983). In a strikingly similar case to Petitioner's, the Czurlanis plaintiff was suspended following a county board meeting at which he uncovered misbehavior among employees of Union County, New Jersey. Id. at 100. Like Petitioner, Mr. Czurlanis was a citizen, taxpayer, and employee of Union County. Id. at 99. Like Petitioner, Mr. Czurlanis discovered the misbehavior amounting to inefficiency, falsification of reports, unnecessary work, and questionable qualifications of one of the county Directors while working there. Id. at 100. Like Petitioner, Mr. Czurlanis chose to speak out about such behavior at a place where he was provided the opportunity and where he thought his remarks would be most effective. Id. Unlike Petitioner however, the Third Circuit found Mr. Czurlanis' suspension to be in violation of his First Amendment rights because it was done in retaliation for his speech on matters of public concern. Id. at 105.

In assessing the case according to Connick, the Czurlanis court recognized that the plaintiff

> spoke as a concerned citizen and taxpayer and not an aggrieved employee. He protested the waste of taxpayer money and alleged serious deficiencies in record keeping. Moreover, he raised these matters before the Board, which was the body with legislative power and investigative power germane thereto.

(Citation omitted). Id. at 104. Cf. Hoffman v. Mayor, 905 F.2d 229, 234 (8th Cir. 1990) (classifying favoritism and government misfeasance as matters of "general public interest or concern"); Glass v. Dachel, 2 F.3d 733, 741 (7th Cir. 1993) (maintaining that complaints made to district attorney lent a "public air" to the form of the speech). Czurlanis further considered the fact that such information was gained on the job to be of no relevance to the nature of the speech itself. Id.

In light of this then, consistency mandates that the Sixth Circuit assess Petitioner's similar case in a similar fashion. Such however, cannot be further from the truth. Even though Petitioner engaged in virtually identical behavior to the Czurlanis's plaintiff by "sp[eaking] as a concerned citizen and taxpayer ... before the Board, which was the body with legislative power... germane thereto," the Sixth Circuit failed to even mention the public context of Petitioner's speech. See Appendix D. Moreover, the opinion states that "Florio describes only waste and inefficiency, and not some more perilous or scurrilous flaw in a public agency's functioning." See Appendix D. "[O]nly waste and inefficiency" was sufficient to constitute public concern as a matter of law for Czurlanis, and has been sufficient for other circuits as well[5]. E.g., Rookard v. Health and Hospitals Corp., 710 F.2d 41, 44 (2nd Cir. 1983) (holding that government waste is "obviously" a topic of public concern). This Court should not allow such inconsistency to continue regarding the fundamental rights of all citizens. Petitioner's Petition for Writ of Certiorari should be granted, and the merits of the matter heard.

B. This Court Should Clarify the Criterion for Determining Matters of Public Concern In Order To Prevent Further Sacrifice of the Constitutional Rights of Government Employees to the Chaos of Inconsistent Decisions That Have Arisen in This Area.

In Pickering and its progeny, the court has given credence to the government's legitimate interest in regulating its operations. Decisions such as the one at bar however, look too restrictively upon the guaranteed liberties of public employees in order to shield its government interest. **Any** disclosure of waste or mismanagement will in reality cause problems between employer and employee because disclosure threatens those in power. This is especially true in local governments when disclosure of waste and mismanagement may affect an official's chance to win re-election. Nonetheless, that disclosure is the essence of the First Amendment:

---

[5] Strangely enough, the Sixth Circuit has cited Czurlanis for the proposition that waste of taxpayer's money is a matter of public concern. See Marhonic v. Walker, 800 F.2d 613 (6th Cir. 1986) (comparing Czurlanis's rule to situation in which employee spoke on government billing fraud). Apparently, the court has since abandoned support of the Czurlanis position in favor of its new, more restrictive test.

> Those who won our independence believed...that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; ... that the greatest menace to freedom is an inert people; [and] that public discussion is a political duty....

Whitney v. California, 274 U.S. 357, 360 (1927) (Brandeis, J. concurring). Such tension "is the price the First Amendment exacts in return for an informed citizenry." Monsanto, 674 F.2d 990, 1001 (3rd Cir. 1982).

This Court should therefore decide whether to foster the courage of disclosure in those closest to the source, or silence them with rules that cloak the wrongdoers in an armor of "a more perilous or scurrilous flaw" where "waste and inefficiency" do not suffice as important public topics. After all, such "courage [is] the secret of liberty." Whitney, 274 U.S. at 360 (Brandeis, J, concurring). The First Amendment's purpose can therefore only be promoted if those closest to the source of wrongdoing can speak out without fear. Sullivan, 376 U.S. at 271 (noting that "the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive"); Monsanto, 674 F.2d at (stating that public employees should be able to speak "without fear of retaliatory dismissal" in order to promote "free and open debate").

Freedom of expression is "the matrix, the indispensable condition, of nearly every other form of freedom", Palko v. Connecticut, 302 U.S. 319 (1937); it must thus not be arbitrarily abridged by the unpredictable operation of a particular court's "'test'". See also Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530 (1980) (stating that a decision allowing government to choose "permissible subjects for political debate would be to allow that government control over the search for political truth"). The lower courts need a clearer standard regarding what issues constitute matters of public concern in order to thwart the present chaos surrounding a right the Framers deemed so evidently fundamental they protected it first. This Court should consequently grant Petitioner's Petition for Writ of Certiorari and the review the matter on its merits.

CONCLUSION

For these reasons, Petitioners respectfully request that this Court grant their Petition for Writ of Certiorari and order the merits of the matter heard.

Respectfully Submitted,
"s/ Robert J. Sindyla "
Robert J. Sindyla (0024344)
Attorney for Petitioners
7530 Lucerne Drive, Suite 200
Middleburg Heights, OH 44130
(216) 243-2800

CERTIFICATE OF SERVICE

The foregoing Petition for Writ of Certiorari was served by regular U.S. mail this 7th day of July, 1995, upon opposing counsel Alan E. Johnson and Leo. R. Ward, Attorneys for Respondents, at Ward and Associates, 1280 West Third Street, 3rd Floor, Cleveland, Ohio 44113.

"s/ Robert J. Sindyla "

Appendix A:
Decision of the United States District Court
Granting Respondents' Motion for Summary Judgment

#3 September 27 P.M. 4:19
Clerk
Northern Ohio District
Cleveland

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CHRISTOPHER FLORIO, et al.,	CASE NO. 1:91CV0295
Plaintiffs,	
v.	Judge John M. Manos
lilGARY SKOREPA, et al.,	
Defendants.	MEMORANDUM OF OPINION

On February 14, 1991, Christopher Florio and Sharon Florio (Florio's wife), plaintiffs, filed the above-captioned case against the City of North Royalton, Ohio and Gary Skorepa, its mayor, defendants. Plaintiff Florio alleges that the defendants violated his first amendment rights when they suspended and discharged him from municipal employment.

On March 25, 1991, Defendant Skorepa filed a motion to dismiss based on qualified immunity and on May 6, 1991, it was denied. Defendant Skorepa appealed and on May 12, 1992, the Sixth Circuit Court of Appeals affirmed in part and reversed in part and reversed in part. Florio et al v. Skorepa et al., No. 91-3540 (6th Cir. May 12, 1992).

On August 24, 1992, defendants moved for summary judgment. On September 8, 1992, plaintiffs filed a brief in opposition and moved for summary judgment. For the following reasons, defendants, motion is granted.

I.

Plaintiff Florio was employed as a Laborer I in the Service Department of North Royalton. During the summer of 1989, he had an ongoing feud with Jack Darby, the city's Service Director. He repeatedly accused Darby of "seniority discrimination" and "employee harassment" and filed at least seven union grievances against him.

On September 18, 1989, Plaintiff Florio addressed the city council during a public question period at the end of its regular meeting. Defendant Skorepa was present on the dais.

Plaintiff Florio identified himself as a taxpayer and asked two questions: (1) why another city employee, Skip Mayer, a Laborer III, had been assigned a city car and was earning an excessive salary due to overtime for clerical work that should have been done by a worker with a lower grade, and (2) why the city's Service Director (Darby) was allowed to threaten the city's employees with bodily injury and why he (Darby) was the subject of so many grievances.

A city council member inquired how Plaintiff Florio had personal knowledge about the Service Department after which Plaintiff Florio identified himself as a city employee. Another council member asked Defendant Skorepa to respond to the inquiries and Defendant Skorepa indicated that he could not comment because Plaintiff Florio and others had grievances pending against Darby and because Mayer's position was under negotiation with the union.

Several days later, Defendant Skorepa terminated Plaintiff Florio's employment. Plaintiff Florio filed a grievance with the union and the arbitrator ruled that his actions were "egregious" but did not constitute just cause for termination. He was reinstated, but was not awarded back pay.

Plaintiff Florio filed this case alleging violation of his right to free speech. He and his wife seek damages for emotional distress, loss of consortium, declaratory relief, attorney's fees, and compensatory and punitive damages.

Defendant Skorepa filed a motion to dismiss based on qualified immunity. It was denied and he appealed. The Sixth Circuit Court of Appeals affirmed in part, reversed in part, and remanded the case "to determine whether his [Florio's] speech is a matter of public concern and deserving constitutional protection." Florio et al. v. Skorepa et al., No. 91-3540, slip op. at 6 (6th Cir. May 12, 1992).

II.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

The party moving for summary judgment bears the initial burden of production under Rule 56. The burden may be satisfied by presenting affirmative evidence that negates an element of the non-movant's claim or by demonstrating "an absence of evidence to support the non-moving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554 (1986).

If the movant meets this burden, the non-movant must "set forth the

specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The substantive law identifies which specific facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). To avoid summary judgment, the non-movant must "make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322, 106 S.Ct. at 2552.

"The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson, 477 U.S. at 256, 106 S.Ct. at 2513 (citing Adickes v. Kress & Co., 398 U.S. 144, 158-59 (1970)). However, the non-movant must "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp. , 475 U.S. 574, 586, 106 S.Ct. 1348, 1356 (1986). "[T]he mere existence of some alleged factual disputes between the parties will not defeat an otherwise properly supported motion" for summary judgment. Anderson, 477 U.S. at 247-48, 106 S.Ct. at 2510.

III.

The first amendment protects a public employee's speech that addresses public concerns, but not personal concerns:

> When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable.
>
> . . . [W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 1690 (1983).

In Barnes v. McDowell, 848 F.2d 725 (6th Cir. 1988), cert. denied, 488 U.S. 1007, 109 S.Ct. 789 (1989), the court addressed discharged employees and speech concerning public funds and government efficiency.

It held that "[t]he mere fact that public monies and government efficiency are related to the subject of a public employee's speech do not, by themselves, qualify that speech as being addressed to a matter of public concern." Barnes, 848 F.2d at 734. However, it noted that allegations of misspending and inefficiency may imply that an official is corrupt and public corruption is a matter of public concern. Id. Therefore, speech is protected if it "seek[s] to bring to light actual or potential wrongdoing or breach of public trust." Brown v. City of Trenton, 867 F.2d 318, 322 (6th Cir. 1989), citing Jurgensen v. Fairfax County, 745 F.2d 868, 879 (4th Cir. 1984).

In this case, the Sixth Circuit Court of Appeals held that "Florio's speech relating to threats by his department head was directed at issues outside the concern of the public." Florio et al. v. Skorepa et al., No. 91-3540, slip op. at 6 (6th Cir. May 12, 1992). The Court of Appeals was unable to discern whether his remarks concerning the use of a city car by an employee and the payment of excessive overtime was "an allegation of public corruption or whether [he] merely sought the correction of work related concerns in a public forum," and remanded the case to address this issue. Id.

IV.

Plaintiff Florio admits that his comments concerning Mayer were not motivated by a desire to uncover public corruption. In his deposition, Plaintiff Florio states that he was concerned with the misspending of public funds in his department and had no idea why Mayer was being paid overtime for clerical work. He also stated that he "never even thought about it [Mayer's pay and use of the car] being illegal or not," and did not believe that Mayer was involved in any kind of kickback or other "under the table stuff." Although Plaintiff Florio may have been justified in believing that the City was misspending tax dollars, he presented no evidence linking any of these charges to corruption in the City Service Department and admitted that he did not intend to uncover any illegal activity or breach of the public trust. Therefore, Plaintiff Florio's comments were of personal interest and "a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior" that is directed outside the public concern. Connick v. Myers, 103 S.Ct. at 1690.

Accordingly, defendants' motion for summary judgment is granted on Plaintiff Florio's constitutional claims. Plaintiffs' state claims are dismissed without prejudice.

IT IS SO ORDERED.

"s/ John M. Manos "
UNITED STATES DISTRICT JUDGE

#3 Sept 27 P.M. 4:19
Clerk
Northern Ohio District
Cleveland

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CHRISTOPHER FLORIO, et al.,	CASE NO. 1:91CV0295
Plaintiffs,	
v.	Judge John M. Manos
GARY SKOREPA, et al.,	
Defendants.	ORDER

Pursuant to the Memorandum of Opinion issued in the above-captioned case this date, defendants' motion for summary judgment is granted on plaintiffs' constitutional claims and plaintiffs' state claims are dismissed without prejudice.

IT IS SO ORDERED.

"s/ John M. Manos"
UNITED STATES DISTRICT JUDGE

Appendix B:
Decision of the Sixth Circuit Court of Appeals
Affirming in Part and Reversing in Part
the Denial of Respondents' Motion to Dismiss

No. 91-3540

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Filed
MAY 12, 1992
Leonard Green, Clerk

CHRISTOPHER FLORIO,
SHARON FLORIO,

Plaintiffs-Appellees,

V.

GARY SKOREPA, THE CITY OF NORTH ROYALTON,

Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Ohio.

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

_____/

BEFORE: KENNEDY and GUY, Circuit Judges; and ENGEL, Senior Circuit Judge.

PER CURIAM: Defendant Gary Skorepa appeals the denial of his motion to dismiss on grounds of qualified immunity in this civil rights action. Plaintiff Christopher Florio alleges first amendment and due process violations resulting in his suspension and discharge from municipal employment. The termination followed a speech by Florio at a City Council meeting during which he complained about several employment-related issues. Because we find, under the reasoning of Connick v. Myers,[1] that a portion of Florio's speech concerned a matter of only personal interest, we REVERSE in part and AFFIRM in part the District Court's denial of the motion to dismiss.

In reviewing the action of the District Court, we must first decide whether we are reviewing a Federal Rules of Civil Procedure 12(b)(6) motion to dismiss or the denial of a summary judgment.

I.

Plaintiffs' complaint alleges that Christopher Florio was employed as a Laborer I in the Service Department of the City of North Royalton, Ohio. On September 18, 1989, he spoke at a meeting of the City Council of North Royalton. He complained that another city employee, a Laborer III, had been assigned a city car and was earning an excessive salary due to overtime awarded. He further asserted that the city's service director was

[1] 461 U.S. 138 (1983).

being allowed to threaten employees with bodily harm.

The complaint further recites that Gary Skorepa, the Mayor of the City of North Royalton, suspended Florio from his position as a result of Florio's speech and eventually suspended his pay. Florio filed a Union Grievance. The arbitrator assigned the dispute ruled that the suspension was without just cause and reinstated Florio. The arbitrator did not award Florio back pay for the year of suspension.

The complaint alleges violations of Florio's right to free speech and to substantive due process under the First and Fourteenth Amendments to the Constitution. Florio and his wife, Sharon, sought damages for emotional distress, loss of consortium, declaratory relief, attorney's fees, and compensatory and punitive damages. The claims were against the City and against Skorepa in both his official and individual capacities.

Skorepa's motion to dismiss argues that the claims brought against him in his individual capacity should be dismissed on the basis of qualified immunity. The District Court, upon a oral motion by Florios' counsel, apparently allowed limited discovery relative to the issue of qualified immunity. The record is silent regarding discovery, but counsel indicated at oral argument that such permission was granted. The issue raised by the motion was then briefed by the parties. The District Court denied the motion by a margin entry without explanation. Skorepa filed a timely notice of appeal.

II.

The record indicates that the district judge denied a motion to dismiss, pursuant to Fed. R. Civ. P. 12(b), filed by Skorepa. Rule 12(b)(6) allows the defendant in a suit to move for dismissal where the plaintiff has failed "to state a claim upon which relief can be granted." Courts considering the validity of such a motion are limited to review of statements in the complaint and should not consider extraneous matters raised in support or resistance of the motion. If,

> matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Fed. R. Civ. P. 12(b).

The District Court, in considering Skorepa's motion, apparently allowed discovery on the issue of qualified immunity. Following submission of briefs by both parties, the district Judge merely signed an order denying the motion. No explanation was provided nor was any indication given of what

facts, documents, or evidence was considered by the judge in arriving at his decision. As noted, Rule 12(b) requires that once a court decides to treat a motion to dismiss as a summary judgment motion, opportunity must be given to the parties to present evidence relevant to a summary judgment motion. The parties in this case were never notified that the motion was being considered as a motion for summary judgment.

Because we find that the judge's denial of the motion to dismiss was made on a form indicating that it was ruling on a motion to dismiss and that the judge never notified the parties that he considered the motion as one for summary judgment, we will consider this appeal as one from the denial of a motion to dismiss. As such, we base our review on the contents of the pleadings only and will not consider extraneous evidence or testimony.

III.

The doctrine of qualified immunity provides an "immunity from suit rather than a mere defense to liability . . . [which is] effectively lost if a case is erroneously permitted to go to trial." Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). The issues of qualified immunity and the protected status of speech both pose legal questions. Mitchell, 472 U.S. at 526 (addressing qualified immunity); Connick v. Myers, 461 U.S. 138, 148 n.7 (1983) (addressing protected status of speech). Therefore, no deference is due the decision of the trial judge and this Court may address the issue de novo.

Public officials acting in their official capacity and performing discretionary functions have qualified immunity from individual liability for damages resulting from the discretionary functions. Davis v. Holly, 835 F.2d 1175, 1178-79 (6th Cir. 1987). The doctrine of qualified immunity provides that the public official cannot be sued individually unless the conduct in question violates a "clearly established statutory or constitutional right of which a reasonable person would have known." Harlow v. Fitzizerald, 457 U.S. 800 (1982). The statutory or constitutional right allegedly violated must be so clearly established when the conduct was committed that any official in the defendant's position would understand that his conduct violates those rights. Anderson v. Creighton, 483 U.S. 635 (1987); Guercio v. Brod, 911 F.2d 1179 (6th Cir. 1990), cert. denied, 111 S. Ct. 1681 (1991). In seeking to determine clearly established law, a district court is bound by the precedents of the Supreme Court, its court of appeals and itself. Ohio Civil Serv. Employees Ass'n v. Seiter, 858 F.2d 1171, 1174 (6th Cir. 1988).

The Supreme Court decision in Pickering v. Board of Education, 391 U.S. 563 (1968) considered the violation of a right similar to the one alleged by Florio. The Supreme Court in PickeRing held that a public employee's interest in speaking on matters of public concern is protected by the first amendment only "insofar as it is of greater weight than the employer's interest in 'promoting the efficiency of the public services it performs through its employees.'" Guercio, 911 F.2d at 1183 (quoting Pickering, 391

U.S. at 568). However, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson, 483 U.S. at 640. Thus, the issue, properly stated, is whether reasonably competent officials could disagree on whether Florio's speech was protected. Garvie v. Jackson, 845 F.2d 647 (6th Cir. 1988). This Court, in the decision of Guercio, held that First Amendment rights exist and are clearly established to an extent necessary to overcome a qualified immunity defense when the speech addresses a matter of public concern and when the speech does not unduly disrupt departmental discipline, efficiency, or morale. Guercio, 911 F.2d at 1185-86 (citing Pickering, 391 U.S. at 568).

We first address the question of whether Florio's comments before the City Council can fairly be categorized as a speech on matters of public concern. The Supreme Court has held that,

> when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Connick, 461 U.S. at 147. The First Amendment is not implicated where personal interests are raised. Id. at 143. Florio contends that his speech addressed the public concerns of 1) the allocation of money via the use of a city car and paid overtime and, 2) threats against city employees by the City Service Director.

The Supreme Court, in Pickering, indicated that a matter of public concern would be one which presented a question that was determined by popular vote and involved an issue of public interest. 391 U.S. at 569-70. The Supreme Court furthered defined "public concern" in Connick finding it is "any matter of political, social, or other concern to the community." 461 U.S. at 146. This Court has interpreted those decisions several times. This Court upheld a motion to dismiss in Garvie finding that Garvie's "criticisms more closely resembled an employee's complaints regarding his superior's actions and his own responsibilities...than a citizen's speaking out on a matter of public decisionmaking." 845 F.2d at 651. The decision in Barnes v. McDowell directly addressed discharged public employees and comments concerning public funds and government efficiency. 848 F.2d 725, 733 (6th Cir. 1988), cert. denied, 488 U.S. 1007 (1989). The Barnes' Court noted that "the mere fact that public monies and government efficiency are related to the subject of a public employee's speech do not, by themselves, qualify that speech as being addressed at a matter of public concern." Id. at 734.

THe Barnes' Court acknowledges, however, that allegations of misspending and inefficiency may imply that an agency or official is corrupt. Public corruption is a matter of public interest and warrants constitutional protection. Id. at 734 (citing Solomon v. Royal Oak Townshp, 842 F.2d 862, 865 (6th Cir. 1988)).

The purposes behind Florio's remarks concerning the use of a public car by a public employee and the payment of excessive salary are not evident from the face of the complaint. This Court is unable to discern whether Florio's speech can be read as an allegation of public corruption or whether Florio merely sought the correction of work-related concerns in a public forum. The resolution of this uncertainty is necessary in order to determine whether his speech is a matter of public concern and deserving of constitutional protection. Therefore, we AFFIRM the decision of the District Court denying the motion to dismiss in order that the nature of Florio's speech on these issues may be deduced. As to Florio's complaints related to threats by his department head, clearly these complaints raise no issue of political or social concern to the community. Rather, Florio spoke on a matter of personal interest, already the subject of arbitration and negotiation, in a public forum. Because Florio's speech relating to threats by his department head was directed at issues outside the concern of the public, we REVERSE the decision of the District Court denying the motion to dismiss as it relates to this portion of Florio's speech.

The action is REMANDED to the District Court for further proceedings consistent with this opinion.

Appendix C:
Decision of the Sixth Circuit Court of Appeals
Affirming the Grant of Respondents' Motion for Summary Judgement

FILED
MAY 30, 1995
Leonard Green, Clerk

NOT RECOMMENDED FOR PUBLICATION
No. 93-4174

UNITED STATES COUT OF APPEALS
FOR THE SIXTH CIRCUIT

CHRISTOPHER FLORIO AND SHARON FLORIO,

Plaintiffs-Appellees.,

v.

GARY SKOREPA and CITY OF NORTH ROYALTON,

Defendants-Appellees.

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

BEFORE: NELSON and DAUGHTREY, Circuit Judges, and CHURCHILL, District Judge.*

PER CURIAM. Christopher Florio, an employee of the City of North Royalton, was discharged by the mayor because of questions he raised during an open session of the City Council regarding the operation of his department. He brought this action under 42 U.S.C. § 1983 against the City and Mayor Gary Skorepa, alleging that he was discharged in retaliation for his exercise of rights protected by the First Amendment. The district court granted summary judgment against Florio, finding that his speech was not on a matter of public concern and, thus, could not support a retaliatory discharge action.

Florio appeals this adverse grant of summary judgment. We agree that Florio's speech did not implicate a matter of public concern, because it was confined to allegations of misspending and inefficiency in his work unit. We therefore affirm the judgment of the district court.

* The Honorable James P. Churchill, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

I.

Florio was employed as a laborer in the Service Department of North Royalton, Ohio. On September 18, 1989, Florio addressed the City Council during a public question period at the end of its regular meeting. Defendant Skorepa, Mayor of North Royalton, was present on the dias. Florio identified himself as a taxpayer and asked two questions: (1) why another city employee, Skip Mayer, had been assigned a city car and was earning an excessive salary due to overtime for clerical work that should have been done by a worker with a lower pay grade, and (2) why the City's Service Director, Jack Darby, was allowed to threaten employees with bodily injury and was the subject of a high number of grievances. A council member inquired as to how Florio had personal knowledge of the Service Department. Florio then identified himself as an employee of that department. Another council member asked Mayor Skorepa to respond to the inquiries, and Skorepa indicated that he could not comment because Florio and others had grievances pending against Darby[1] and because Mayer's position was under negotiation with the union.

Several days later, Skorepa terminated Florio's employment. Florio filed a grievance with the union. An arbitrator ruled that Florio's actions were "egregious" but did not constitute just cause for termination.

Florio then filed his § 1983 complaint in February 1991. In response, defendant Skorepa, in his individual capacity, filed a motion to dismiss on the basis of qualified immunity. The district court denied this motion, and Skorepa took an interlocutory appeal to this court.

On May 12, 1992, the Sixth Circuit affirmed in part and reversed in part. The opinion, however, related not to the question of qualified immunity but to the threshold issue of whether Florio's speech was protected under the First Amendment. The panel held that "Florio's speech relating to threats by his department head was directed at issues outside the concern of the public. . . ." Accordingly, this court reversed the denial of qualified immunity as to that portion of Florio's speech. The panel affirmed the denial of summary judgment insofar as Fiorio's speech alleging misspending and inefficiency was concerned. The panel said that it was "unable to discern whether Florio's speech [could] be read as an allegation of public corruption or whether Florio merely sought the correction of work-related concerns in a public forum. The resolution of this uncertainty is necessary in order to

---

[1]Florio had filed seven grievances against Darby, from April through August of 1989. In these grievances, Florio had variously complained that: (1) when he had been injured on the job, he had been denied special duties, although another injured employee was given special duties; (2) Darby had been obnoxious about a misunderstanding which arose when a contractor failed to show; (3) Darby took away his newspaper which he read during breaks; (4) Darby assigned Florio to replace Darby's brother-in-law on the back of the trash pick-up truck, despite the availability of employees with less seniority; (5) Darby responded in a sarcastic manner when Florio approached him about a grievance, thrust Florio out of his office, and violently slammed the door behind Florio. Darby denied relief when each of these grievances was filed through union channels.

determine whether his speech is a matter of public concern and deserving of constitutional protection." The panel thus remanded the case to the district court to determine whether Florio's speech was on a matter of public concern.

On remand, the district court held that:

> Although Plaintiff Florio may have been justified in believing that the City was misspending tax dollars, he presented no evidence linking any of these charges to corruption in the City Service Department and admitted that he did not intend to uncover any illegal activity or breach of the public trust. Therefore, Plaintiff Florio's comments were of personal interest and.....outside the public concern.

The district court then dismissed Florio's complaint without prejudice.

II.

In order to prevail in a retaliatory discharge action under § 1983, a plaintiff must first establish that he or she engaged in speech that is constitutionally protected because it addressed a matter of public concern. Rankin v. McPherson, 483 U.S. 378, 384 (1987); Barnes v. McDowell, 848 F.2d 725, 732 (6th Cir. 1988), cert. denied, 488 U.S. 1007 (1989). Whether a plaintiff's speech addressed a matter of public concern is a question of law, requiring *de novo* review by an appellate court. Barnes, 848 F.2d at 733. If the plaintiff's speech did not address a matter of public concern, no further inquiry is necessary. Id.

We reviewed the law relevant to speech on a matter of public concern in our earlier opinion in this case, noting as follows:

> The Supreme Court has held that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. Connick, 461 U.S. at 147. The First Amendment is not implicated where personal interests are raised. Id. at 143. Florio contends that his speech addressed the public concerns of 1) the allocation of money via the use of a city car and paid overtime and, 2) threats against city employees by the City Service Director.
>
> The Supreme Court, in Pickering, indicated that a matter of

> public concern would be one which presented a question that was determined by popular vote and involved an issue of public interest. 391 U.S. at 569-70. The Supreme Court further[] defined "public concern" in Connick[,] finding it is "any matter of political, social, or other concern to the community." 461 U.S. at 146. This Court has interpreted those decisions several times. This Court upheld a motion to dismiss in Garvie v. Jackson, 845 F.2d 647 '6th Cir. 1988)] finding that Garvie's "criticisms more closely resembled an employee's complaints regarding his superior's actions and his own responsibilities . . . than a citizen's speaking out on a matter of public decisionmaking." 845 F.2d at 651. The decision in Barnes v. McDowell directly addressed discharged public employees and comments concerning public funds and government efficiency. 848 F.2d 725, 733 . . . . The Barnes[] Court noted that "the mere fact that public monies and government efficiency are related to the subject of a public employee's speech do not, by themselves, qualify that speech as being, addressed at a matter of public concern." Id. at 734. The Barnes[] Court acknowledges, however, that allegations of misspending and inefficiency may imply that an agency or official is corrupt. Public corruption is a matter of public interest and warrants constitutional protection. Id. at 734 (citing Solomon v. Royal Oak Township, 842 F-2d 862, 865 (6th Cir. 1988)).

On remand, the district court observed that "[a]lthough Plaintiff Florio may have been justified in believing that the City was misspending tax dollars, he presented no evidence linking any of these charges to corruption in the City Service Department and admitted that he did not intend to uncover any illegal activity or breach of the public trust." As indicated above, Barnes holds that "[t]he mere fact that public monies and government efficiency are related to the subject of an employee's speech do[es] not, by [itself], qualify that speech as being addressed to a matter of public concern." 848 F.2d at 734. Moreover, the district court's conclusion, that misspending must be linked to proof of corruption, is further supported by this passage from Barnes:

> While [the plaintiff] may have been justified in his beliefs that his section of the Business Enterprise Program did not receive enough of the operating budget, that the Program should have had a 24-hour repair deadline before he instituted one and that the wisdom and propriety of some of the Program's purchasing practices was questionable, no evidence linking any of these charges to corruption in the

> Bureau or in the Program. Consequently, instead of having addressed a matter of public concern, Thompson's complaints appear to be nothing more than examples "of the quintessential employee beef: management has acted incompetently."

848 F.2d at 734-35.

The Sixth Circuit has recently examined this issue in another case, Rahn v. Drake Center, Inc., 31 F.3d 407 (6th Cir. 1994). Rahn was discharged following a press release by a committee of which she was chair; the press release was highly critical of the new administration of the public hospital at which Rahn worked as a nurse. The Rahn panel cited Murray v. Gardner, 741 F.2d 434 (D.C. Cir. 1984), cert. denied, 470 U.S. 1050 (1985), in which the D.C. Circuit held that since matters involving public monies and government inefficiency may be raised in connection with virtually any public employment matter, they could not be used to convert an issue into one of public concern within the stricture of Connick.

> [T]he fact that Rahn believed that the money was not being spent in a wise fashion, by itself, is insufficient to find that the press release addressed a matter of public concern. . . . The focus of this comment is not on patient endangerment arising from the misapplication of tax dollars; rather, the focus is on the employees' discontent with new work rules which might lead to a patient endangerment situation. . . . Moreover, this is not a case where the public employee has 'uncovered' a fraud being committed on the taxpayers. . . . The public was aware of the facts.

Rahn, 31 F.3d at 412-413. In Rahn, we implicitly recognized that the scope of public concern is broader that the narrow area of corruption: "patient endangerment" (i.e., a decline in the level of services provided as a result of the alleged misspending) would certainly have been a matter of public concern.

However, Florio has failed to demonstrate that his comments fell within the perimeters of public concern that we have recognized in Barnes and in Rahn. Florio describes only waste and inefficiency, and not some more perilous or scurrilous flaw in a public agency's functioning.

III.

Because we do not find that Florio spoke on a matter of public concern, we need not engage in a broader inquiry. As Florio is unable to make a prima facia showing that his First Amendment rights are infringed, we need not address the question of qualified immunity. The judgment of the district court is therefore AFFIRMED, and the case is DISMISSED.

Appendix D:
42 U.S.C. § 1983 (1988)

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R. S. § 1979; Dec. 29, 1979, P. L. 96-170, § 1, 93 Stat. 1284.)

No. 95-185

In The

Supreme Court of the United States

October Term, 1995

CHRISTOPHER FLORIO, et al.,

Petitioners,

vs.

GARY SKOREPA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

ALAN E. JOHNSON
Counsel of Record
LEO R. WARD
WARD & ASSOCIATES, A Legal Professional Association
1265 W. 6th St., 4th Floor
Cleveland, OH 44113
(216) 241-0515

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

17 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

A. PROCEDURAL HISTORY OF THE CASE 1

B. STATEMENT OF THE FACTS 3

ARGUMENT 8

I. SPEECH AT A CITY COUNCIL MEETING REGARDING ISSUES THAT ARE THE SUBJECT OF PENDING LABOR GRIEVANCE PROCEEDINGS BY A CITY EMPLOYEE INVOLVED IN THOSE GRIEVANCES IS NOT SPEECH ON A MATTER OF PUBLIC CONCERN WITHIN THE MEANING OF THIS COURT'S CASES 8

II. NO CONFLICT AMONG THE CIRCUITS EXISTS WITH REGARD TO THE TYPE OF FACT SITUATION INVOLVED IN THE PRESENT CASE 12

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Barnes v. McDowell, 848 F.2d 725 (6th Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989) 10, 11

Connick v. Myers, 461 U.S. 138 (1983) 8, 9, 11

Czurlanis v. Albanese, 721 F.2d 98 (3d Cir. 1983) 13

Edmundson v. Borough of Kennett Square, 881 F. Supp. 188 (E.D. Pa. 1995) 13

Murray v. Gardner, 741 F.2d 434 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1050 (1985) 11

Pickering v. Board of Education, 391 U.S. 563 (1968) 9, 10, 12

Rahn v. Drake Center, Inc., 31 F.3d 407 (6th Cir. 1994) 10, 11

United States v. National Treasury Employees Union, 115 S.Ct. 1003 (1995) 9

Waters v. Churchill, 114 S.Ct. 1878 (1994) 10

UNITED STATES CONSTITUTION

First Amendment 1, 9, 10

Fourteenth Amendment 1

UNITED STATES CODE

42 U.S.C. § 1983 1

TO THE HONORABLE SUPREME COURT:

Respondents respectfully request that this Court deny the Petition for Writ of Certiorari submitted by the petitioners.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY OF THE CASE

Petitioners' Statement of the Case is inaccurate. Petitioners filed their Complaint in this action on February 14, 1991. The Complaint requested declaratory, injunctive, and monetary relief pursuant to 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the United States Constitution. Count I of the Complaint alleged that the respondents – the City of North Royalton ("City" or "North Royalton") and its Mayor, Gary Skorepa ("Skorepa"), in his individual and official capacities – violated the First Amendment rights of petitioner Christopher Florio ("Florio") by discharging him from his employment with the Service Department of the City. Counts II and III of the Complaint alleged state claims of wrongful discharge and intentional and negligent infliction of emotional distress. Count IV of the Complaint was brought by Florio's wife, petitioner Sharon Florio; that count appeared to allege a state claim of emotional distress or loss of consortium.

On March 25, 1991, respondent Skorepa, in his individual capacity, filed a motion to dismiss on the basis of federal qualified immunity. The District Court denied said qualified immunity motion, and Skorepa took an interlocutory appeal. On May 12, 1992, the Sixth Circuit

Court of Appeals affirmed in part and reversed in part. (Appendix "B" to Petition for Writ of Certiorari). The panel held that "Florio's speech relating to threats by his department head was directed at issues outside the concern of the public . . . . " (*Id.* at 5). Accordingly, the Sixth Circuit reversed the denial of qualified immunity as to that portion of Florio's speech. (*Id.*). However, the Sixth Circuit affirmed the denial of the qualified immunity motion to dismiss insofar as Florio's speech alleging misspending and inefficiency was concerned. The panel held that this portion of Florio's speech might be actionable if said speech implied that an agency or official was corrupt, since "[p]ublic corruption is a matter of public interest and warrants constitutional protection." (*Id.*). The Court was "unable to discern whether Florio's speech can be read as an allegation of public corruption or whether Florio merely sought the correction of work-related concerns in a public forum. The resolution of this uncertainty is necessary in order to determine whether his speech is a matter of public concern and deserving of constitutional protection." (*Id.*). Therefore, the Sixth Circuit affirmed that portion of the denial of the qualified immunity motion to dismiss that involved Florio's allegations of misspending and inefficiency. (*Id.*).

After remand, respondents North Royalton and Skorepa filed a motion for summary judgment, which included a motion by Skorepa in his individual capacity for summary judgment on the basis of qualified immunity. Petitioners also filed a motion for summary judgment. In a Memorandum of Opinion and Order, filed September 27, 1993, the District Court granted respondents' motion for summary judgment on the federal

claims and dismissed petitioners' state claims without prejudice. (Appendix "A" to Petition for Writ of Certiorari). Petitioners appealed, and on May 30, 1995, the Sixth Circuit Court of Appeals affirmed the grant of summary judgment to respondents. (Appendix "C" to Petition for Writ of Certiorari). In their Petition for Writ of Certiorari, the petitioners request that this Court review the May 30, 1995 Sixth Circuit decision.

B. STATEMENT OF THE FACTS

The facts set forth in this brief are supported by the evidence of record submitted with the motions for summary judgment in the District Court.

In August of 1987 Florio commenced his employment with the City of North Royalton as a Laborer I in the Service Department. In 1988 Jack Darby ("Darby") was appointed as the first Director of the Service Department. The Service Department was and continued to be understaffed, having no more than thirty workers for a city of 24,000 people. During his first few months as Service Director, Darby spent much of his time developing the City's first strategic plan to use its employees in the most efficient manner possible and to prepare for its public works and maintenance programs.

When Darby became Service Director, the department had an employee named Carl Prahl ("Prahl"), who functioned at that time as a Working Foreman. However, Prahl became quite ill in 1989, missed a great deal of work, and eventually passed away. Therefore, Darby assigned William "Skip" Mayer ("Mayer"), who was then a Laborer III, the tasks of a Working Foreman. Mayer had

previous experience filling in for Prahl and the former General Foreman, and Mayer was an excellent worker. Mayer had extensive duties and was essentially in charge of the day-to-day operations of the department. He prepared work orders, made job assignments, supervised work crews, oversaw jobs in progress, and ensured that equipment and supplies, such as stone, paving materials, pipe, and the like, were available as needed. Mayer also assisted Darby in planning and executing the department's strategic plans for flood control, snow removal, and the like. Darby did not consider Mayer's duties to be "secretarial" in nature.

Mayer's predecessor, Prahl, had been assigned a service department truck, though he did not take the truck home. Ed Swim, a Working Foreman at the cemetery, was not on 24 hour call. However, Swim was already assigned a City vehicle and allowed to take it home. Mayer was on 24 hour call. When the Service Department was given an old police cruiser, Darby arranged for Mayer to be assigned the car, as the department was short on trucks. Mayer frequently drove to different job sites throughout the day to monitor and supervise work, and solve various problems. Often, Mayer stopped by one or more sites in the evening before going home. Consequently, to ensure that Mayer would be on time and have transportation in an emergency, and consistent with the precedent of Ed Swim, Mayer was allowed to take the car home.

As a result of Mayer's extensive duties, his appearance at emergencies, his response to calls at various hours, and his assistance in clearing up a backlog of work and help in planning, Mayer earned a significant amount of overtime. It was Darby's understanding that the union

wanted overtime to be equally distributed to all its members. In addition, the union was concerned that someone performing managerial tasks was included in the bargaining unit. However, the City's citizens benefited immensely from having a "Working Foreman". Accordingly, the City and the union negotiated over this position. The next union contract provided for the position of "Working Foreman", outside the bargaining unit.

Darby's treatment of Mayer was motivated by a desire to have the department's work performed as effectively as possible and not by a desire to play favorites or allow anyone to benefit unfairly. Although Florio sometimes saw Mayer working at a desk, Florio admitted at his deposition that he did not know Mayer's job functions. Florio also does not know why the City was paying Mayer what they were paying him, why the City was allowing Mayer to drive the City car, and why the City was allowing Mayer to get overtime. Florio testified that "I never even thought about it being illegal or not." Florio has no evidence that anything relating to Mayer involved any kind of kickbacks or similar improper private gain, and Florio has "no idea" whether any such illegal conduct occurred.

Notwithstanding his admitted lack of opinion, knowledge, and evidence regarding unlawful or corrupt activity, Florio complained at the September 18, 1989 City Council meeting about Mayer's situation because Florio (according to his own deposition testimony) believed such treatment involved a "misspending" of public money. Petitioners characterize this Council meeting as a "town meeting"; however, North Royalton has a typical Midwestern Mayor-Council form of government, not a

New England "town meeting" system in which the citizens vote directly on legislation. Moreover, the period of the Council characterized by petitioners as the "free speech" period is merely the portion of the meeting in which North Royalton residents are allowed to express their views on various topics. Petitioners' repeated use of the terms "town meeting" and "free speech" period evokes a participatory democracy style of government that may exist in some New England communities as distinguished from the representative form of government existing in North Royalton and most Midwestern communities.

Mayor Skorepa initiated disciplinary proceedings against Florio because Skorepa believed Florio's comments at the Council meeting disclosed confidential matters that were the subject of discussions with the union. The issues pertaining to Mayer were the subject of a grievance, and it had been agreed in an executive session in the Mayor's office, which Florio attended, that those issues would be included in forthcoming formal collective bargaining negotiations. Although Florio was not part of the negotiating team, Skorepa testified that "he was part of the grievance procedure" and "[b]y his position or presence he was privy to that in the office at the time that this took place." It was understood that such discussions are confidential.

The disciplinary process that Skorepa initiated resulted in a ruling by the arbitrator that Florio should be reinstated to his position. However, the arbitrator denied back pay to Florio because he found that Florio's comments at the Council meeting constituted egregious conduct. Accordingly, the instant case is not about

reinstatement of Florio to his position – that has already been accomplished and Florio remains a North Royalton employee – but rather about the labor arbitrator's seasoned judgment that Florio was not entitled to back pay because Florio flagrantly disregarded collective bargaining protocol by discussing at a City Council meeting matters that were the subject of pending union grievances.

The fact that the subject of Florio's speech was inextricably connected with collective bargaining matters is indicated by petitioners' statement that "[e]ach of Florio's revelations concerning waste and mismanagement was subsequently corrected by Mayor Skorepa." (Petition for Writ of Certiorari at 3 n.2). What petitioners fail to mention is that the matters of which Florio complained at the Council meeting had been the subject of discussions, attended by Florio, wherein these grievances were scheduled for inclusion in the forthcoming collective bargaining negotiations. Any changes for which Florio takes credit were not the result of Florio's speech at the Council meeting but were rather the result of a labor grievance proceeding that Florio knew was already in progress at the time Florio took it upon himself to address these matters at the Council meeting.

ARGUMENT

I. SPEECH AT A CITY COUNCIL MEETING REGARDING ISSUES THAT ARE THE SUBJECT OF PENDING LABOR GRIEVANCE PROCEEDINGS BY A CITY EMPLOYEE INVOLVED IN THOSE GRIEVANCES IS NOT SPEECH ON A MATTER OF PUBLIC CONCERN WITHIN THE MEANING OF THIS COURT'S CASES.

"Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 147-48 (1983). "The inquiry into the protected status of speech is one of law, not fact." *Id.* at n.7.

In *Connick v. Meyers*, this Court held that most of the statements made by Myers did not constitute speech on a matter of public concern because

> Meyers did not seek to inform the public that the District Attorney's Office was *not discharging its governmental responsibilities* in the investigation and prosecution of criminal cases. Nor did Meyers seek to bring to light *actual or potential wrongdoing or breach of public trust* on the part of Connick and others. Indeed, the questionnaire, if released to the public, would convey no information at all other than the fact that a single employee is upset with the status quo. While discipline and morale in the workplace are related to an agency's efficient performance of its duties, *the focus of Myers' questions is not to evaluate the performance of the office but rather to gather information for another round of controversy with her superiors. These questions reflect one*

> *employee's dissatisfaction* with a transfer and *an attempt to turn that displeasure into a cause celebre.*

461 U.S. at 148 (emphasis added).

The Court found that the question in Myers' questionnaire inquiring if assistant district attorneys "ever feel pressured to work in political campaigns on behalf of office supported candidates" did raise a matter of public concern because "official pressure upon employees to work for political candidates not of the worker's own choice constitutes a coercion of belief in violation of fundamental constitutional rights." 461 U.S. at 149. Once a court has determined that a public employee has spoken on a matter of public concern, it applies the balancing test of *Pickering v. Board of Education*, 391 U.S. 563 (1968). *United States v. National Treasury Employees Union*, 115 S.Ct. 1003, 1012-13 (1995). Accordingly, in *Connick*, the Court applied the *Pickering* balancing test to the question regarding pressure to work in political campaigns on behalf of office supported candidates; the Court concluded that "[t]he limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships." *Connick*, 461 U.S. at 154.

Petitioners' Petition for Writ of Certiorari is full of discussions of this Court's First Amendment jurisprudence in areas other than government employment. However, *Connick* recognized that "it would indeed be a Pyrrhic victory for the great principles of free expression if the [First] Amendment's safeguarding of a public

employee's right, as a citizen, to participate in discussions concerning public affairs were confused with the attempt to constitutionalize the employee grievance that we see presented here." 461 U.S. at 154. Moreover, "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering*, 391 U.S. at 568. "[T]he government as employer indeed has far broader powers than does the government as sovereign. . . . To begin with, even many of the most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by governmental employees." *Waters v. Churchill*, 114 S.Ct. 1878, 1886 (1994) (plurality opinion).

In the present case the Sixth Circuit Court of Appeals held that "Florio's speech did not implicate a matter of public concern, because it was confined to allegations of misspending and inefficiency in his work unit." (Petition for Writ of Certiorari, Appendix "C" at 1). The Sixth Circuit opinion relied primarily on two published Sixth Circuit decisions: *Barnes v. McDowell*, 848 F.2d 725 (6th Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989), and *Rahn v. Drake Center, Inc.*, 31 F.3d 407 (6th Cir. 1994). In *Barnes*, the Sixth Circuit held that a governmental employee's allegations of misspending were not entitled to First Amendment protection unless such allegations were linked to charges of corruption. (Petition for Writ of Certiorari, Appendix "C" at 4-5 (discussing *Barnes*)). In *Rahn*, the Sixth Circuit held that a governmental employee's press release alleging that "money was not being spent in a wise fashion, by itself, is insufficient to find that the press

release addressed a matter of public concern. . . . The focus of this comment is not on patient endangerment arising from the misapplication of tax dollars; rather, the focus is on the employees' discontent with new work rules which might lead to a patient endangerment situation. . . . Moreover, this is not a case where the public employee has 'uncovered' a fraud committed on the taxpayers." (Petition for Writ of Certiorari, Appendix "C" at 7 (quoting *Rahn*, 31 F.3d at 412-13)).

The Sixth Circuit opinion in the present case concluded that "Florio has failed to demonstrate that his comments fell within the perimeters of public concern that we have recognized in *Barnes* and in *Rahn*. Florio describes only waste and inefficiency, and not some more perilous or scurrilous flaw in a public agency's functioning." (Petition for Writ of Certiorari, Appendix "C" at 7-8).

The Sixth Circuit follows the D.C. Circuit's interpretation of *Connick* that " '*Connick* would stand for nothing' " if speech regarding " 'public monies and government efficiency' " could alone constitute speech on matters of public concern, since "those two arguments can be raised in connection with virtually any public employment matter. . . . " *Barnes*, 848 F.2d at 734 (citing and quoting from *Murray v. Gardner*, 741 F.2d 434 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1050 (1985)); *Rahn*, 31 F.3d at 412; Petition for Writ of Certiorari, Appendix "C" at 5).

The Sixth Circuit view is consistent with the decisions of this Court. In *Connick*, the Court held that several statements made by Meyers did not constitute speech on a matter of public concern because the statements did not

allege that "the District Attorneys' Office was not discharging its governmental responsibilities" and did not "seek to bring to light actual or potential wrongdoing" by other governmental employees. 461 U.S. at 148. The statements at issue in *Pickering* were "in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher." 391 U.S. at 569-70. Rather, "the letter constituted, basically, an attack on the School Board's handling of the 1961 bond issue proposals and its subsequent allocation of financial resources between the schools' educational and athletic programs." *Id.* at 566. In contrast to the fact situation in *Pickering*, the Sixth Circuit observed in the present case that "Florio's speech did not implicate a matter of public concern, because it was confined to allegations of misspending and inefficiency *in his work unit.*" (Petition for Writ of Certiorari, Appendix "C" at 1 (emphasis added)). Moreover, as elaborated in the Statement of the Case, *supra*, Florio's statements in the City Council meeting involved matters that were the subject of pending and scheduled labor negotiations regarding employee grievances. Under such circumstances, Florio's remarks certainly did not constitute speech on a matter of public concern.

II. NO CONFLICT AMONG THE CIRCUITS EXISTS WITH REGARD TO THE TYPE OF FACT SITUATION INVOLVED IN THE PRESENT CASE.

Petitioners' Petition for Writ of Certiorari suggests that a conflict exists among the circuits with regard to what constitutes speech on a matter of public concern. Assuming, *arguendo*, that any such conflict exists, this

case is not the appropriate case to resolve such conflict because the circuits would not necessarily disagree on whether Florio's speech addresses a matter of public concern. None of the cases cited by petitioners held that a fact situation involving only allegations of misspending or inefficiency in the governmental employee's own working unit, without any linkage to allegations of corruption, wrongdoing, or criminal conduct, constituted speech on a matter of public concern. Indeed, the case upon which petitioners mainly rely involved accusations that other employees had made false reports amounting to fraud as well as speech involving county issues having nothing to do with the employee's work situation. *Czurlanis v. Albanese*, 721 F.2d 98, 100, 101 (3d Cir. 1983). Furthermore, only one of the cases cited by petitioners involved speech relating to collective bargaining negotiations, and that case held that such speech was *not* speech on a matter of public concern. *Edmundson v. Borough of Kennett Square*, 881 F. Supp. 188, 195 (E.D. Pa. 1995).

Accordingly, no conflict among the circuits exists with regard to the type of fact situation involved in the present case.

CONCLUSION

As demonstrated above, the holding of the Sixth Circuit Court of Appeals in the present case is consistent with the decisions of this Court as well as the decisions of other circuits. Therefore, respondents respectfully request that the Court deny the Petition for Writ of Certiorari submitted by petitioner.

Respectfully submitted,

ALAN E. JOHNSON
Counsel of Record
LEO R. WARD
WARD & ASSOCIATES, A Legal Professional Association
1265 W. 6th St., 4th Floor
Cleveland, OH 44113
(216) 241-0515

Attorneys for Respondents